88-1981

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER, 1988 TERM

FRANK DeRANGO, JOHN DeSIMONE,
ROBERT EATMAN, WILLIAM GUIDE,
WILLIAM HAAS, JOSEPH PENA
AND DENNIS SMENTEK,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

FRANK DeRANGO, JOHN DeSIMONE,
ROBERT EATMAN, WILLIAM GUIDE,
WILLIAM HAAS, JOSEPH PENA
AND DENNIS SMENTEK,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

I. QUESTIONS PRESENTED FOR REVIEW.

A. Does an indictment alleging that a defendant aided and abetted a "kingpin" under 18 U.S.C. § 2 and 21 U.S.C. §848, Continuing Criminal Enterprise, where there is no companion count alleging any substantive narcotics violation, state an offense recognized at law and thereby subject the aider and abettor to the harsh mandatory minimum penalties applicable to kingpins?

B. If, as concluded by the United State Court of Appeals for the Seventh Circuit, *en banc*, persons who aid and abet a kingpin that are organized, supervised or managed by that kingpin *cannot* be charged under the kingpin statute while persons who aide and abet a kingpin who are independent of that kingpin *can* properly be charged under the kingpin statute, must whether a particular defendant is or is not organized, supervised or managed by the kingpin be decided by the unanimous vote of a jury?

II. LIST OF PARTIES.

The caption of the case in this Court contains the names of all the parties to this case.

III. TABLE OF CONTENTS AND TABLE OF AUTHORITIES.

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IV. REPORTS OF OPINIONS.

The opinion of the United States Court of Appeals for the Seventh Circuit which is the subject of this Petition is not reported. The opinion of the United States District Court for the Northern District of Illinois, Eastern Division is not reported. Copies of both decisions are found in the Appendix to this Petition.

V. JURISDICTIONAL STATEMENT.

A. The date of the entry of the judgment of the United States Court of Appeals for the Seventh Circuit sought to be reviewed herein is April 4, 1989.

B. No order has been entered either respecting a rehearing or granting an extension of time within which to petition for certiorari.

C. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S.C. § 1254(1).

VI. CONSTITUTIONAL AND STATUTORY PROVISIONS.

A. Amendments To The United States Constitution: Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

B. Amendments To The United States Constitution: Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defence."

C. Amendments To The United States Constitution: Amendment VIII

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

D. 18 U.S.C. § 2(a)

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

E. 21 U.S.C. § 848(B) "Continuing Criminal Enterprise" defined.

"For purposes of subsection (a), a person is engaged in a continuing criminal enterprise if—

"(1) he violates any provision of this title or title III the punishment for which is a felony, and

"(2) such a violation is part of a continuing series of violations of this title or title III—

"(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position or any other position of management, and

"(B) from which such person obtains substantial income or resources."

VII. STATEMENT OF THE CASE

The seven petitioners in this case are all former Chicago police officers who were assigned to the 10th District Tactical Unit. These petitioners, plus three additional former Chicago police officers known collectively as the "Marquette 10", were charged in a sixty-seven count, 112 page indictment alleging, essentially, that the ten accepted bribes and payoffs from drug dealers for allowing drug operations to continue. These events were alleged to have occurred from 1976 to 1980. Following a twelve week jury trial, each petitioner was convicted of multiple offenses. They were subsequently sentenced to terms of imprisonment ranging from 10 to 20 years, with consecutive sentences of five years probation. Each petitioner was convicted of aiding and abetting at least one continuing criminal enterprise, 21 U.S.C. § 848, and aiding and abetting at least one drug conspiracy, 21 U.S.C. § 846. All petitioners were convicted of substantive RICO violations, 18 U.S.C. § 1962(c), as well

as a RICO conspiracy. 18 U.S.C. § 1962(d). Finally, each petitioner was convicted of at least one count of extortion, 18 U.S.C. § 1951.

Of the original "Marquette 10," one is deceased, and two have been released. The remaining seven are petitioners in this case.

The Seventh Circuit affirmed the convictions on direct appeal. Included in the issues considered was the question of whether a defendant can be convicted of aiding and abetting a "kingpin" under 21 U.S.C. § 848. The Seventh Circuit answered that question in the affirmative. *United States* v. *Ambrose*, 740 F.2d 505 (7th Cir. 1984), *cert. denied* 472 U.S. 1017 (1985). However, in reaching this result, the Seventh Circuit held that the mandatory minimum penalties of 21 U.S.C. § 848 were not applicable to aiders and abettors.

After the Second Circuit rendered its opinion that a defendant could not be convicted of aiding and abetting a kingpin, *United States* v. *Amen*, 831 F.2d 373 (2d Cir. 1987), *cert. denied* (unrelated defendant) 108 S.Ct 1573 (1988), petitioners brought a motion in the district court pursuant to 28 U.S.C. § 2255. That petition was denied in an unreported order, a copy of which is set forth in the Appendix. On appeal from that order, the Seventh Circuit again upheld convictions for aiding and abetting 21 U.S.C. § 848. *DeRango* v. *United States*, Number 88-2003, (7th Cir. April 4, 1989) (Unpublished Order not to be cited per Seventh Circuit Rule 53). A copy of that order is set forth in the Appendix. In that ruling, the Seventh Circuit held that its decision regarding these petitioners was controlled by its *en banc* decision in *United States* v. *Pino-Perez*, 870 F.2d 1230 (7th Cir. 1989).

In *Pino-Perez* the Seventh Circuit, while affirming, with three judges dissenting, convictions for aiding and abetting 21 U.S.C. section 848, retreated from the position

announced in *Amen*, and stated that mandatory minimum sentences now applied to aiders and abettors.

The defendant in *Pino-Perez* has pending before this Court a petition for a writ of certiorari. Petitioners submit this Petition for Writ of Certiorari from the judgment of the United States Court of Appeals for the Seventh Circuit.

The basis for federal jurisdiction in the court of first instance in this case is 18 U.S.C. § 2255. The basis for jurisdiction in the United States Court of Appeals for the Seventh Circuit is 28 U.S.C. § 1291.

VIII. ARGUMENT FOR ALLOWANCE OF WRIT.

The Decision By The United States Court of Appeals For The Seventh Circuit, Holding That A Conviction Under 21 U.S.C. § 848 (The "Kingpin" Statute) As An Aider And Abettor Is Permissible, Is In Direct Conflict With The Position Taken By The United States Court Of Appeals For The Second Circuit And Disregards The Legislative History Of The Statute.

This case is appropriate for consideration by this Court in order to resolve conflicting interpretations of an important federal criminal statute reached by the United States Courts of Appeals for the Second and Seventh Circuits.

Section 848 of Title 21 of the United States Code, the continuing criminal enterprise or "kingpin" statute, is recognized as a powerful tool in the federal prosecutor's arsenal. Congress has provided for harsh, mandatory minimum penalties for those persons within its ambit. At the time of Petitioners' offenses, the mandatory minimum prison sentence was ten years, with no eligibility for parole. The penalties have since been increased to a mandatory minimum twenty years in prison, again with no possibility of parole. The mandatory sentencing guidelines enacted after the date of Petitioners' offenses, but applicable to all future offenses, also expose those convicted under § 848, whether

as the kingpin himself or as aiders and abettors, to substantial penalties which may be more than the mandatory minimum twenty-year sentence, but certainly will be no less.

On its face, § 848 is applicable to the kingpin himself, since conviction under this section requires proof that a defendant occupied a "position of organizer, a supervisory position, or any other position of management," over at least five other persons with whom he acted in concert. 21 U.S.C. § 848(b)(2). (This section is now numbered § 848(d)(2)(A) pursuant to amendments effective after Petitioners date of conviction.) In addition, substantial proceeds must have been derived from the criminal enterprise as part of a continuing series of narcotics violations. As stated in *Garrett v. United States*, 471 U.S. 773, 781, 105 S.Ct. 2407, 2413, 85 L.Ed.2d 764 (1985), § 848 is a "carefully crafted prohibition aimed at a special problem . . . (and) designed to reach the 'top brass' in the drug rings, not the lieutenants and foot soldiers." Petitioners do not in any way challenge the validity of § 848 nor the appropriateness of the mandatory minimum penalties for kingpins themselves.

However, Petitioners were charged as aiders and abettors of the kingpin under the provisions of 18 U.S.C. § 2. That statute punishes as principals those who aid and abet the person who committed the offense. Whether an aider and abettor may properly be exposed to the harsh penalties for kingpins under 848 has been addressed by the Second and Seventh Circuits with differing results.

1. The Second Circuit

The Second Circuit has considered the issue of whether a conviction is proper for aiding and abetting 21 U.S.C. § 848 on several occasions. In each instance, the conclusion reached is that an underling may not be convicted of aiding and abetting a kingpin. In this case, it was alleged that the Petitioners were look-outs or guards of the kingpins who testified against them. There were no allegations that these

Petitioners were themselves kingpins. Following is a brief discussion of the Second Circuit authorities.

a. United States v. Amen, 831 F.2d 373 (2d Cir. 1987).

In considering the aiding and abetting issue, the Second Circuit noted that the government had conceded that "an employee" of a kingpin cannot be convicted of aiding and abetting, but that nonemployees of a kingpin may be so convicted. *Amen* at 331. The Court then embarked upon a review of the legislative history of 21 U.S.C. § 848, concluding that "[W]hile the legislative history makes no mention of aiders and abettors, it makes clear that the purpose of making CCE a new offense rather than leaving it as sentence enhancement was not to catch in the CCE net those who aided and abetted the supervisors' activities, but to correct its possible constitutional defects by making the elements of the CCE triable before a jury." *Id.* at 332.

The Second Circuit considered and rejected as "unworkable" the governments proffered distinction between an employee and a third party helping the kingpin. In that the government failed to establish all of the elements of 21 U.S.C. § 848 against one of the defendants, his conviction of aiding and abetting a kingpin was reversed.

b. United States v. Benevento, 836 F.2d 60 (2d Cir. 1987).

In this case the government asserted that " . . . under limited circumstances, aiding and abetting liability is appropriate in section 848 cases." *Benevento* at 64. The government suggested that one who lends substantial assistance to the enterprise, while acting in a managerial capacity, although not an employee, can be convicted as an aider and abettor. Based upon its prior decision in *Amen*, the Second Circuit again held that there is no criminal liability for aiding and abetting 21 U.S.C. § 848.

c. United States v. Aiello, 864 F.2d 257 (2d Cir. 1988).

In this case, the question presented was whether aiding and abetting another offense could constitute a predicate for 21 U.S.C. § 848. The Second Circuit answered in the affirmative, with the caveat that the aider and abettor must be a "kingpin." *Aiello* at 261. In reaching this conclusion, the court reaffirmed its prior holding in *Amen* "that because section 848 applies only to the person in charge of a CCE, one cannot incur [CCE] liability for aiding and abetting such a person." *Amen*, 831 F.2d at 381.

2. Seventh Circuit

Following is a brief discussion of the two reported Seventh Circuit decisions which stand for the proposition that one can be convicted of aiding and abetting a kingpin.

a. United States v. Ambrose, 740 F.2d 505 (7th Cir. 1984).

In the first appeal on this issue by Petitioners, the Seventh Circuit stated that "[t]he defendants in this case are not the kingpins; *Ambrose* 740 F.2d at 507. The court then went on to agree prophetically with the Second Circuit that Congress did not intend, as the government conceded, those who are organized, supervised, or managed by the kingpins to be subject to the harsh penalties of 21 U.S.C. § 848. *Id.* Yet the court was able to divine that Congress "probably would have wanted *them* to be punishable, in an appropriate case, as severely as the kingpins themselves." (emphasis in original) *Id.* at 508. The *them* refers to "the kingpins' police protectors," also known as the Petitioners in this case.

Quite frankly, it appears that the court may have been applying its sense of morality to a class of defendants which it found particularly distasteful. Certainly this was a high visibility case at the time of the trial and after, and has become the subject of a chapter in a recent book concerning judicial corruption in local state trial courts. Nonetheless,

the Seventh Circuit cannot legislate its view of morality into the language of a criminal statute.

The court did go on to note, again asserting its view of the meaning of a statute that facially is clear and unambiguous, that Congress must have intended 18 U.S.C. § 2 to enhance the discretion of the judge at sentencing, thereby allowing a trial judge to abrogate the mandatory minimum of 21 U.S.C. § 848 by the unspoken Congressional intent contained in 18 U.S.C. § 2. Thus, the mandatory minimum provisions were not applicable to nonemployees convicted of aiding and abetting a kingpin. *Id.* at 508-509.

b. **United States v. Pino-Perez, 870 F.2d 1230 (7th Cir. 1989).**

The Seventh Circuit decided this case *en banc* due to the contrary position taken by the Second Circuit in *Amen*. In so doing, it started its analysis by noting that the government was correct in adopting the position that "persons supervised by the kingpin cannot be punished as aiders and abettors." Slip op. at 3. The court then went on to dissect the Second Circuit's analysis of the legislative history of 21 U.S.C. § 848, concluding that the Second Circuit was wrong, and that the Seventh Circuit was correct in holding that nonemployees of kingpins could be convicted of aiding and abetting kingpins. The majority went on to correct its earlier holding in *Ambrose*, and determined that the mandatory minimum sentences applicable to a kingpin are also applicable to that kingpins nonemployee aiders and abettors. Slip op.at 13-14.

Three judges dissented from the above ruling. In doing so, the dissent points out that 18 U.S.C. § 2 is not to be read woodenly. Rather, accessory liability is to be determined by viewing the statutory framework. Slip Op. at 17-18. In essence, the dissent agrees with the Second Circuit, and goes beyond it by considering the interplay of 21 U.S.C. §§ 841 and 848 as mandating a continuum of increasing penalties for narcotics offenders who move up the ladder of

criminality. The dissent concludes that to elevate the lowest level to the highest, as the majority does, defiles that Congressional structure and was not intended.

Yet Petitioners submit that the real nugget in the dissent is Judge Easterbrook's final sentence: "A prosecutor who wants a mandatory minimum sentence or a life maximum should not be allowed to evade the need to prove the defendant's supervisory role under section 848 or the quantity of drugs involved under section 841." Slip op. at 21. That is exactly what happened to these Petitioners. Just as the Seventh Circuit in *Ambrose* apparently had its own sense of morality offended by police officer defendants, so did the United States Attorney's office when it instituted these charges. No grand jury determined that probable cause existed that any or all of the Petitioners had engaged in each and every element of 21 U.S.C. § 848. In fact, the Seventh Circuit specifically stated that the Petitioners were not kingpins. No petit jury was asked to determine whether any, or each of the Petitioners was an employee, and thus not guilty of aiding and abetting, or an independent contractor.

The current buzz words in criminal justice are "The War on drugs." The old adage among criminal defense counsel is that individual rights are lost for all citizens in organized crime and narcotics cases. In this case, a prosecutor wanted more severe sentences for defendants than were applicable under criminal statutes allegedly violated by these defendants. Not to be deterred by the law, the zealous prosecutor charged the defendants with a statute under which he could never obtain a substantive conviction. Yet through the magic of aiding and abetting and a sympathetic court, extortion convictions were elevated to the draconian penalties mandated by 21 U.S.C. § 848. Judge Easterbrook was more totally on point in his closing remarks than even he may have thought.

3. The Harm

Petitioners submit that it is beyond doubt that a split exists between the Second and Seventh Circuits on the issue of whether there is aiding and abetting liability under the kingpin statute. Petitioners would also submit to this Court that the current emphasis—political, media, law enforcement, and prosecutorial—is on narcotics offenses. There will be a geometric increase in prosecutions under 21 U.S.C. § 848. More states will enact drug laws modeled after it. Being tough on drugs and narcotics traffickers is easy. Politicians know that all audiences will support such a stance. The executive branch, from enforcement through prosecution, has pledged to win the war on drugs. Yet martial law has not been imposed, nor have the rights guaranteed by the Constitution been suspended.

This Court has been the even keel, balancing the fleeting emotions of a society tuned to 30-second television news bits and one sentence cliches with our long enduring values. Petitioners do not ask this Court to be "soft on drugs," nor should the prosecution ask this Court to be "tough on drugs." Please do not narrow the parameters of individual rights because of distaste for police officers who allegedly protected drug dealers. Please do not equate "being conservative" with ruling against narcotics defendants. Please consider the analysis of the Second Circuit, and the dissent in *Pino-Perez*. This is an issue which should be resolved now by this Court. These Petitioners were convicted and given draconian sentences based upon a substantive offense for which no evidence was presented to the grand jury establishing the necessary elements. And, they were convicted by a petit jury not instructed on the judicially imposed elements of the offense. Were they employees or independent contractors? The petit jury did not address this issue.

There is no doubt that Congress intended severe penalties, *Jeffers* v. *United States*, 432 U.S. 137, 150 n.14, 157 n.26 (1977). But, as the Second Circuit, and the dissent in

Pino-Perez stated, there was no Congressional intent to apply these severe penalties to nonkingpins.

To fail to hear this case is to send a clear message to prosecutors that they no longer need worry about specific elements of substantive offenses, for aiding and abetting without proof will give them the sentences that want, even without the necessary substantive proofs. Today it is a narcotics case, but history teaches that tomorrow it will be mail fraud or tax evasion. Stop the abuse here and now.

4. Conclusion

Petitioners respectfully ask this Court to grant their Petition for Writ of Certiorari. Petitioners also suggest that this case be consolidated with *United States* v. *Pino-Perez*, wherein a petition for a writ of certiorari is also pending on the same issue.

Dated at Glen Ellyn, Illinois
June 2, 1989.

Respectfully submitted,

FRANK DERANGO, JOHN DESIMONE, ROBERT EATMAN, WILLIAM GUIDE, WILLIAM HAAS, JOSEPH PENA AND DENNIS SMENTEK, *Petitioners*

By:_____

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APPENDICES

JUDGMENT—WITHOUT ORAL ARGUMENT

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60604

APRIL 4, 1989.

Before

Hon. Walter J. Cummings, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. FRANK H. EASTERBROOK, *Circuit Judge*

FRANK DERANGO, et al, *Petitioners-Appellants,*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 88-2003 vs.	No. 81 CR 664
UNITED STATES OF AMERICA, *Respondent-Appellee.*	John F. Grady, *Judge*

This cause came before the Court for decision on the record from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the order of this Court entered this date.

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604
SUBMITTED NOVEMBER 15, 1988
APRIL 4, 1989.

Before
Hon. Walter J. Cummings, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. FRANK H. EASTERBROOK, *Circuit Judge*

FRANK DERANGO,
DENNIS SMENTECK,
JOSEPH PENA,
JAMES BALLAUER,
ROBERT EATMAN,
JOHN DeSIMMONE, AND
CURTIS LOWRY,
Petitioners-Appellants,

No. 88-2003 vs.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 81 CR 664

John F. Grady, *Judge*

ORDER

The petitioners-appellants were convicted of violating federal narcotics, racketeering and extortion laws on June 30, 1982.[1] On February 3, 1988, the petitioners filed a motion under 28 U.S.C. § 2255, asking that their convictions for aiding and abetting a drug "kingpin" be set aside in light of

[1] On direct appeal, we vacated the convictions under 21 U.S.C. § 846, affirmed the remainder of the convictions and remanded for resentencing. *United States* v. *Ambrose*, 740 F.2d 505 (7th Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985).

the Second Circuit's decision in *United States* v. *Amen*, 831 F.2d 373 (2d Cir. 1987), *cert. denied sub nom. Abbamonte* v. *United States*, 108 S. Ct. 573 (1988). In *Amen*, the court held that 18 U.S.C. § 2 does not apply to 21 U.S.C. § 848. The district court denied the motion on April 22, 1988, and this appeal followed.[*]

The issue on appeal is controlled by our decision in *United States* v. *Pino-Perez*, No. 88-1507 (7th Cir. March 10, 1989) (en banc). For this reason, the district court's judgment is hereby

AFFIRMED.

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53

[*] This appeal was originally consolidated with No. 88-1406. Our decision in that case was issued on December 21, 1988. *United States* v. *DeRango*, 864 F.2d 520 (7th Cir. 1988).

81CR0664.188

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,*	
v.	NO. 81 CR 664
THOMAS AMBROSE, et al., *Defendants.*	

ORDER DENYING PETITION TO VACATE AND SET ASIDE CONVICTION

The court has considered the petition of William Haas, William Guide, Dennis Smentek, John F. DeSimone, Robert Eatman, Joseph Pena, James F. Ballauer, Curtis Lowery and Frank DeRango to set aside their convictions and vacate their sentences on Counts I and III of the indictment on the ground that the aider and abettor statute, 18 U.S.C. § 2, does not apply to the continuing criminal enterprise statute, 21 U.S.C. § 848. On the direct appeal in this case, the Seventh Circuit rejected this argument and specifically held that the defendants had been properly convicted as aiders and abettors of a continuing criminal enterprise. *United States* v. *Ambrose*, 740 F.2d 507, 508 (7th Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985). Petitioners concede in their reply brief that the doctrines of *stare decisis* and law of the case would ordinarily preclude this court from reconsidering the issue, but argue that the usual rule is inapplicable here because the reasoning of the Second Circuit in *United States* v. *Amen*, 831 F.2d 373 (2nd Cir. 1987), is more persuasive than that of the Seventh Circuit in *Ambrose*.

This court believes itself bound by *Ambrose*, both on the basis of *stare decisis* and as the law of the case. It would be inappropriate for us to consider the merits of petitioners' argument, let alone the question of whether the analysis in *Amen* is more persuasive than that of *Ambrose*. If the law of this case is to be changed, it must be done by the Seventh Circuit.

The petition is denied.

DATED: April 22, 1988

ENTER: JOHN F. GRADY

United States District Judge

Supreme Court, U.S.
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CLERK

No. 88-1981

In the Supreme Court of the United States

OCTOBER TERM, 1989

FRANK DERANGO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a person may be convicted under 21 U.S.C. 848 and 18 U.S.C. 2 for aiding and abetting a continuing criminal enterprise.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1981

FRANK DERANGO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A2-A3) is unpublished, but the judgment is noted at 873 F.2d 1443 (Table). The order of the district court (Pet. App. A4-A5) is unpublished. An earlier opinion of the court of appeals is published at 740 F.2d 505.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on April 4, 1989. The petition for a writ of certiorari was filed on June 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners

were convicted of aiding and abetting a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848 and 18 U.S.C. 2; aiding and abetting a drug conspiracy, in violation of 21 U.S.C. 846 and 18 U.S.C. 2; conducting the affairs of an enterprise through a pattern of racketeering activity (RICO) and conspiring to commit that offense, in violation of 18 U.S.C. 1962(c) and 1962(d); and extortion, in violation of 18 U.S.C. 1951. The court of appeals affirmed but remanded for resentencing. 740 F.2d 505 (1984). This Court then denied certiorari. 472 U.S. 1017 (1985). On remand, petitioners were sentenced as follows: Petitioners DeRango, Pena, and Smentek were sentenced to concurrent terms of 12 years' imprisonment without parole on two CCE counts, to concurrent terms of 18 years' imprisonment on the RICO counts and one or more of the extortion counts, and five years' probation on the remaining extortion counts. Petitioners DeSimone and Eatman were sentenced to concurrent terms of ten years' imprisonment with parole on one CCE count and one RICO count, and five years' probation on the other counts against them.[1] Petitioners subsequently filed a motion, pursuant to 28 U.S.C. 2255, seeking vacation of their CCE convictions. The district court denied the motion, Pet. App. A4-A5, and the court of appeals affirmed, Pet. App. A2-A3.

The evidence at trial showed that petitioners, all former Chicago police officers, protected two large drug distributorships in Chicago's Marquette district over a three-year period. Specifically, petitioners warned the distributors of impending raids and of the presence of

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[1] Petitioners William Guide and William Haas are not proper parties before this Court, inasmuch as they were not parties to the appeal below. Their sentences, however, were similar to those imposed on petitioners DeRango, Pena, and Smentek.

honest police officers in the area; they failed to arrest the distributors or their employees and ignored complaints from citizens about the activities of the distributors; they caused cases against the distributors or their employees to be dismissed in state court by writing false arrest reports; they seized narcotics from competing narcotics operations and delivered them to the distributors; they beat up and threatened to kill a drug dealer who was competing with the distributors; and they diverted addict traffic from competing operations to the distributors. In exchange for their efforts on behalf of the protected distributors, petitioners received money, weapons, and other things of value. 740 F.2d at 507; Tr. 801-1162, 2973-3250.

2. Petitioners' CCE convictions rested on the theory that they had aided and abetted the kingpins in running the drug enterprise. At trial, petitioners unsuccessfully moved to dismiss the CCE count on the ground that the aiding and abetting statute, 18 U.S.C. 2, does not apply to a CCE offense.

On appeal, the court of appeals likewise rejected this contention. The court observed that the kingpin's non-supervisory employees—such as runners, mixers, and lookouts—could not be punished as aiders and abettors because that would undermine Congress's purpose of providing "differential punishment for the kingpin." 740 F.2d at 507. In concluding that petitioners could be so punished, however, the court reasoned that they were "not the kingpins' employees, but the kingpins' police protectors." *Id.* at 508. The court explained (*ibid.*):

> Congress probably would have wanted [the kingpin's police protectors] to be punishable, in an appropriate case, as severely as the kingpins themselves. It is difficult for a large illegal enterprise to flourish without official protection; and the large revenues that such

> enterprises earn * * * enable them to dangle attractive bribes before policemen and other officials. The effectiveness of the kingpin statute might therefore be reduced if a kingpin's police protectors, such as [petitioners], whose efforts enable large drug enterprises to flourish brazenly for years, could never be punished as aiders and abettors.

The court went on to hold, however, that the district judge had erred in assuming that aiders and abettors of a CCE offense are subject to the mandatory minimum sentence provision of the CCE statute.[2] Accordingly, the court remanded for resentencing to allow the district judge to decide if he wanted to punish petitioners as severely as he would have to do if they were the kingpins themselves. 740 F.2d at 508-510.[3]

3. Following the Second Circuit's decision in *United States* v. *Amen*, 831 F.2d 373 (1987), cert. denied, 108 S. Ct. 1573 (1988), that a defendant could not be convicted of aiding and abetting a continuing criminal enterprise, petitioners filed a motion, pursuant to 28 U.S.C. 2255, seeking vacation of their CCE convictions. The district court denied the motion, stating that it was bound by the court of appeals' earlier opinion in this case. Pet. App. A4-A5. The court of appeals summarily affirmed, Pet. App. A2-A3, holding that the case was controlled by its decision in *United States* v. *Pino-Perez*, 870 F.2d 1230 (1989) (en banc), petition for cert. pending, No. 88-7142.

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[2] The minimum penalty for the kingpin is ten years' imprisonment without parole. 21 U.S.C. 848(a).

[3] The court of appeals also vacated petitioners' convictions under 21 U.S.C. 846, on the ground that Section 846 is a lesser included offense of Section 848. 740 F.2d at 510.

In *Pino-Perez*, the Seventh Circuit, sitting en banc, rejected the contrary view of the Second Circuit in *United States* v. *Amen*, and held that a CCE conviction could be based on an aiding and abetting theory. The court held that the aiding and abetting statute, 18 U.S.C. 2, applies to the entire criminal code, and that nothing in the legislative history of the CCE statute forecloses its application to that statute. 870 F.2d at 1233-1234. The court concluded that although "the persons supervised by the kingpin cannot be punished as aiders and abettors," *id.* at 1231, a person who was not a member of the enterprise, but who "participate[d] in" the venture as "something that he wishes to bring about" and who sought "by his action to make it succeed," is liable under 18 U.S.C. 2. 870 F.2d at 1235. The court also overruled that portion of its prior decision in this case that persons who aid and abet a CCE are not subject to the mandatory minimum penalties provided by 21 U.S.C. 848. 870 F.2d at 1236-1237.

ARGUMENT

Petitioners contend (Pet. 7-14) that their CCE convictions must be reversed because CCE convictions may not be obtained on an aiding and abetting theory. The issue whether the aiding and abetting provision, 18 U.S.C. 2, applies to 21 U.S.C. 848 is currently pending before this Court in *Pino-Perez* v. *United States*, No. 88-7142. As we explained in our brief in opposition in that case, nothing in the language of 21 U.S.C. 848 or 18 U.S.C. 2 supports the view that it is impossible to aid and abet a violation of 21 U.S.C. 848. Rather, with some exceptions not pertinent here, the aiding and abetting statute is "applicable to the entire United States criminal code." *Breeze* v. *United States*, 398 F.2d 178, 192 (10th Cir. 1968). See also, *e.g.*,

United States v. *Lennon*, 751 F.2d 737, 741 (5th Cir.), cert. denied, 471 U.S. 1100 (1985). While petitioners do not qualify as drug kingpins, the group specifically targeted by the CCE statute, it is settled that persons who are not members of the class at which a particular criminal statute is directed can nonetheless be held liable for a violation of the statute on an aiding and abetting theory. See *Standefer* v. *United States*, 447 U.S. 10 (1980).

Despite the contrary conclusion by the Second Circuit in *United States* v. *Amen*, nothing in the legislative history of 21 U.S.C. 848 dictates a different result. Although Section 848 in its original form was merely a sentencing enhancement provision, it was ultimately enacted as a separate substantive offense, to which aider and abettor liability automatically attaches. Our arguments on these points are fully set out in our brief in opposition in *Pino-Perez* (at 4-8) and will not be repeated here.[4]

In the present case, as in *Pino-Perez*, it was not unduly harsh to hold petitioners accountable as aiders and abettors. As the court of appeals noted on direct review of this case, petitioners were the kingpins' police protectors, "whose efforts enabled large drug enterprises to flourish brazenly for years." 740 F.2d at 508.

Notwithstanding the conflict between the court below and the Second Circuit in *Amen*, the present case does not warrant further review by this Court. As we explained in our brief in opposition in *Pino-Perez* (at 8-9), the question presented is not likely to be one of recurring importance. *Pino-Perez* is the only other case now pending that raises the same issue. No other circuits have addressed the issue, and there is no reason to believe that any will be confronted with the question in the future. Because the

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[4] We are providing petitioners with a copy of the government's brief in opposition in *Pino-Perez* v. *United States*.

Department of Justice now advises federal prosecutors not to charge violations of the CCE statute on an aiding and abetting theory, few, if any, similar prosecutions are likely to be commenced in the future.

Nor would reversal in this case be likely to affect the period of incarceration served by any of the petitioners. Petitioners DeRango, Pena, and Smentek received no-parole sentences on their 12-year CCE convictions, but they were given longer, concurrent sentences on the racketeering and extortion counts (18 years). Under those circumstances, it is unlikely that they would be subject to release under their 18-year sentences before the expiration of their no-parole CCE sentences, which will likely be reduced to approximately 8 years by the accrual of statutory good time. As for petitioners DeSimone and Eatman, the district court directed that they would be eligible for parole under their 10-year CCE sentences, and they received concurrent 10-year terms on their RICO convictions.[5] Accordingly, even if their CCE convictions were vacated, it would not affect the period of time they would be imprisoned.[6] Moreover, if petitioners' CCE convictions

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[5] Under current Seventh Circuit law, the district court would not have been permitted to direct that DeSimone and Eatman would be eligible for parole, but the earlier mandate of the court of appeals permitted parole-eligible sentences for aiders and abettors under CCE. The district court imposed such sentences on DeSimone and Eatman, and the government did not seek further review of those sentences.

[6] The Bureau of Prisons informs us that petitioners Eatman and DeSimone will be eligible for release after serving their full sentences (minus credit for good time) in February 1991; they were denied early release on parole. The 12-year no-parole sentences imposed on petitioners DeRango, Pena, and Smentek will terminate on April 6, 1992, after credit for good time. While they would theoretically be entitled to parole release on their 18-year sentences as early as April 1991, they

were vacated, they would all be subject to resentencing on the conspiracy count that was vacated as a lesser included offense of the CCE counts. Because the district court was not required to impose mandatory minimum sentences on the CCE counts, the court presumably sentenced each petitioner to the total term of imprisonment that the court believed was appropriate in light of that petitioner's conduct. It is therefore unlikely that the court would alter the total period of incarceration for any petitioner upon substituting a sentence imposed under Section 846 for the sentences imposed under Section 848.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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are not likely to be granted early parole on those sentences, even if their CCE sentences are vacated.

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